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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

ALEX HARDING, also known as
MARK HARDING,
Petitioner,

versus

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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ALEX HARDING, also known as MARK HARDING, your Petitioner, by his attorneys, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above case on October 3, 1974.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Tenth Circuit rendered by Circuit Judge Doyle and entered on October 3, 1974, is printed in the Appendix infra, and to Petitioner's knowledge has not yet been officially reported.

JURISDICTION

The jurisdiction of this Honorable Court is invoked herein briefly on the following grounds:

(1) The judgment of the United States Court of Appeals was entered October 3, 1974, following a remand from the Supreme Court and this final judgment affirmed the conviction of Defendant by a jury verdict;

(2) The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

The charge upon which the conviction was based was that Defendant knowingly and unlawfully took and received from an express company a carton containing allegedly obscene books and reels which were being transported in commerce from Los Angeles, California, to Denver, Colorado.

Within the context of that charge we respectfully and other contemporaneous decisions.

1. Whether the Defendant was deprived of his constitutional rights to have a jury determine the question of obscenity when the stipulation which he entered into on the facts of obscenity were based upon the Roth standards which were later changed by the new standards announced in *Miller v. California* and present the following questions for review:

2. Whether the Court erred in refusing to relieve Defendant of his stipulation as to the facts of obscenity which he based upon the *Roth* Test when the standards of obscenity were thereafter changed, and accordingly he was thereby deprived of his rights to have a jury decide this issue under the new standards.

3. Whether under the circumstances of this case, Defendant having requested a trial by jury, it was then proper for the Court to invade the province of the jury and make a determination as to whether the material involved was obscene under the *Miller v. California* Test, when the Defendant has declared that

he would not have entered into such stipulation had the *Miller* Test been in effect at the time of the trial.

4. Whether there is a violation of due process when the Defendant alleged he would not have stipulated to obscenity under the *Miller* Test and would invoke the judgment of a jury had he known that the *Miller* Test was in effect during his trial.

5. Whether this Court's opinion in Hamling v. United States, 94 S.Ct. 2887 (1974), is applicable to the instant case since in that case there was no stipulation.

We reserve the following questions presented for review as appropriate. In the decision of this Honorable Court decided October 23, 1973 when judgment was vacated and the case remanded to the United States Court of Appeals for consideration in the light of *Miller* and other contemporaneous cases it would appear from the statement of Mr. Justice Brennan that in the light of *Miller* he had no occasion to consider "whether the other questions presented merit plenary review."

Accordingly, if the decision of this Honorable Court on October 23, 1973 did not consider our contentions previously raised in the former Petition for Certiorari [Case No. 72-1646] we would then raise again the questions previously presented for review, embodied in our previous Petition for Certiorari. They are embodied in our previous Petition for Certiorari in Case No. 72-1646, on pages 2 and 3 and are part of the records of this Honorable Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment 6 to the Constitution of the United States.

The statutory provision under which the indictment is based is 18 U.S.C. § 1462.

CONCISE STATEMENT OF CASE

Following a jury trial in the United States District Court for the District of Colorado, Petitioner was convicted of having knowingly received from an express company obscene materials which were then being transported in interstate commerce in violation of 18 U.S.C. § 1462. The Court of Appeals affirmed. Thereafter, a Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit was filed in the Supreme Court, the petition was granted, judgment vacated, and the case remanded to the United States Court of Appeals for further proceedings in light of Miller v. California, 93 S.Ct. 2607, together with other decisions then rendered and dealing with the obscenity issue. The United States Court of Appeals remanded the cause to the District Court for the purpose of a hearing in which the Court should examine the materials and determine whether these materials are obscene under the *Miller* Test. The Appellate Court stated that if the trial judge had reasonable doubt as to whether the materials are obscene under the *Miller* Test, then it would be a basis for relieving the Defendant from the stipulation which he entered.

It should be pointed out that in the trial itself on the indictment, counsel entered into a stipulation with the United States Attorney that the materials involved were pornographic and obscene and such stipulation was admitted into evidence. At this time the *Roth-Memoirs* Test was applicable and the language of the stipulation was couched in the language of that test.

The District Court reexamined the materials and found that they were obscene under the *Miller* standard as well as under the *Roth-Memoirs* standard. The Court of Appeals thereupon reviewed some of the contentions of Appellant, compared them to *Hamling v. United States* and affirmed the judgment. It is from this judgment that we seek certiorari.

BASIS FOR FEDERAL JURISDICTION

The basis for federal jurisdiction in the United States District Court in and for the District of Colorado is predicated upon a purported violation of Sectoin 1462 of Title 18, U.S. Code.

BASIS FOR THIS APPLICATION FOR WRIT OF CERTIORARI

We respectfully submit that there are special and important reasons for granting this petition:

1. First, there is an important question of Federal law and Constitutional law which should be settled by this Court.

Defendant requested a trial by jury. One of the issues of the indictment was whether the material was obscene. He stipulated to the facts of obscenity under the standards of the *Roth* Test. Manifestly the standards or the tests enunciated in *Roth* and *Miller* were different. He avers that he would not have entered into such stipulation had the *Miller* Test been applicable at the time. Whether a juror is constitutionally limited to considering contemporary community standards or national standards is not truly the issue. The point is that a jury might well have found the material not obscene had it been instructed in the language of the *Miller* Test rather than the *Roth* Test — or had it drawn on its own knowledge of the views of the aver-

age person in the community from which it came. It may very well be that the new standards are less exacting to the prosecution, and perhaps obscenity under the standards are more readily provable. But the point is that the Defendant was entitled to his constitutional rights to have a jury determine this question. And to be denied the right to trial by jury is prejudicial, particularly in this case where under the new standards the Defendant would not have stipulated to obscenity but would have invoked the judgment of a jury.

We respectfully submit that under the circumstances of this case, where a defendant has not waived a jury trial, it is not for the Trial Court or the Court of Appeals to determine whether the materials in question would be found obscene by a jury under contemporary community standards and bind Defendant to his stipulation.

2. It is important that there be an adjudication whether *Hamling* is applicable to the instant case since there was no stipulation involved in *Hamling*.

3. Certiorari should be granted in this case for there is vitally involved the Defendant's constitutional rights to a jury. For in view of the changed standards, it is for the jury to make the determination of obscenity and not the Court. This raises an important question of Federal and Constitutional law.

4. Additionally, if the issues we have raised in our previous Petition for Certiorari have not been answered nor considered by this Honorable Court, we believe that these contentions of ours previously made should now be resolved as they raise issues which have never truly been considered nor adjudicated and raise important questions of Federal law which should be settled by this Honorable Court.

Accordingly, we respectfully pray that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,
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APPENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 74-1323

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	Appeal from the United States District Court for the District of Colorado (D.C. No. 71-CR-297)
v.	)	
ALEX HARDING, a/k/a MARK HARDING,	)	
Defendant-Appellant.	)	

Submitted on the briefs.

James L. Treece, United States Attorney, and William K. Hickey, Assistant United States Attorney, for Plaintiff-Appellee.

Edward H. Sherman of Sherman, Sherman & Morgan, P.C. for Defendant-Appellant.

Before SETH, HOLLOWAY and DOYLE, Circuit Judges.

DOYLE, Circuit Judge.

The above cause is appealed to this court following a remand by the Supreme Court of the United States, 414 U.S. 964 (1973), and our remand to the district court pursuant thereto. The district court then held a hearing to consider whether the changed standard of obscenity announced in Miller v. California, 413 U.S. 15 (1973) was capable of altering the result which had been previously reached. This was necessary because the allegedly obscene materials had not been before this court. Following a full hearing by the district court, we once again consider it.

Appellant was originally indicted on August 25, 1971 on a charge of receiving obscene books and films which had been transported in interstate commerce, contrary to 18 U.S.C. § 1462. Following a trial held in May 1972, the appellant was found guilty. This court affirmed the conviction, 475 F.2d 480 (10th Cir. 1973), and in so doing determined that the indictment was sufficient; that the search was legal; and that the stipulation entered into by defendant and the government as to obscenity was valid. The Supreme Court granted certiorari following which the judgment was vacated and the cause was remanded.[1]

Following remand we again considered the validity of the stipulation as to obscenity and determined that the only issue presented was whether the material involved was obscene under the Miller v. California test. We noted that *Miller* had modified the previous standards. Also, we considered whether the new standards made a favorable change from the standpoint of the accused. On this we concluded:

> [T]he new standards are less exacting to the prosecution. Thus, proof of obscenity is much less difficult under these standards. We believe that material found to be obscene under the *Roth-Memoirs* test would unquestionably satisfy the test contained in *Miller*.

491 F.2d at 699.

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1. The terms of the remand are as follows:
. . . that this cause be, and the same is hereby, remanded . . . for further consideration in light of Miller v. California, 413 U.S. 15 (1973); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); Kaplan v. California, 413 U.S. 115 (1973); United States v. 12 200-Ft. Reels of Super 8mm. Film, 413 U.S. 123 (1973); United States v. Orito, 413 U.S. 139 (1973); Heller v. New York, 413 U.S. 483 (1973); Roaden v. Kentucky, 413 U.S. 496 (1973); and Alexander v. Virginia, 413 U.S. 836 (1973).

At the retrial the district court reexamined the materials to confirm that they were the same that had previously been considered and heard the argument of appellant that the stipulation was no longer valid as a result of the changed conditions. On March 20, 1974 the trial court issued its order finding that the material was obscene under the *Miller* standard as well as under the *Roth-Memoirs* standards. The court did not delineate the community consideration, but it had no doubt that the material was obscene under *Miller* and it denied appellant's request that he be relieved of the stipulation.

The only issue presented to us is whether the trial court complied with the mandate of the Supreme Court and of this court.

As is clear from the mandate quoted herein, no particular procedure was ordered by the Supreme Court. The mandate simply called for consideration in the light of subsequent cited cases. However, the district court and this court as well went further. The district court gave the appellant full opportunity to be heard. Nevertheless, the point which he features here is that he did not get a full-scale trial by a jury on the remand. The trial court from an examination of the record and the statements of counsel found in the light of *Miller* that there was no basis for relieving appellant from the stipulation. We agree.

Appellant's further arguments include the following:

1. The tests set forth in *Miller* are substantially different from the *Roth-Memoirs* standards.

    a. *Miller* requires that the materials depict or describe sexual conduct specifically defined by state law.

b. The *Roth-Memoirs* test of no "redeeming social value" was replaced in *Miller* by a test of lack of serious literary, artistic, political or scientific value.

c. *Miller* refers to a community standard, not a national standard. The standards of Metropolitan Denver may well be more liberal than a national standard.

2. Given the differences in the two tests, defendant would not have sipulated to obscenity under the *Miller* case.

3. Failure to relieve defendant of his stipulation where the standards of obscenity have changed deprives him of his right to have the jury decide the issue of obscenity. The trial court is not authorized to decide whether the material is obscene under *Miller*.

The trial court's decision could be affirmed on the basis that it complied with the mandate and that no grounds exist for disturbing its finding of obscenity under the *Miller* test. However, we also think that subsequent decisions of the Supreme Court support the prior decision of this court. Thus, in Hamling v. United States, ____U.S.____, 94 S.Ct. 2887 (1974) the defendants were indicted for using the mails for the purpose of carrying an obscene book and advertisement. They were convicted prior to the *Miller* decision. The Court of Appeals there denied the petition for rehearing but reconsidered the cause after the *Miller* case was announced. The problem presented to the Court of Appeals for the Ninth Circuit in *Hamling* is almost identical with that which we have before us. It was recognized by the Supreme Court in *Hamling* that the juror applies his knowledge of contemporary commu-

nity standards under the *Miller* test as opposed to application of a national standard under the *Roth-Memoirs* standard. In response to the defendant's contention (in *Hamling*) that the jury had been instructed to apply national standards and that the *Miller* case had invalidated that approach, the Supreme Court said:

> *Miller* rejected the view that the First and Fourteenth Amendments require that the proscription of obscenity be based on uniform nationwide standards of what is obscene . . . But in so doing the Court did not require as a constitutional matter the substitution of some smaller geographical area into the same sort of formula . . .

94 S.Ct. at 2901.

The Supreme Court observed in *Hamling* that whether a national or a local standard is used the adjudication must be an objective one and not subjective. The Court remarked that the distinction between national and local standards is often "gossamer."

At bar appellant asserts that his stipulation was made in relation to a national standard, whereas the recent Supreme Court decisions hold that the juror is entitled to consider the community standard. But the Court did not say that a juror is constitutionally limited to considering local standards. The trial court determined that the materials in question would be found obscene under contemporary community standards, and hence we fail to see that there could be any prejudice as a result of the stipulation of obscenity.

Appellant also argues that the definitions contained in the state laws should now, under the present standard, be submitted to the jury. We must reject this. Surely the Supreme Court did not in *Miller* decree that state laws would henceforth govern these federal

prosecutions. The appellant makes no claims that the books and films did not depict conduct such as the examples cited in *Miller*.[2] Moreover, he does not claim a lack of notice under either the prior or present standards. Accordingly, there is no basis for holding that he was prejudiced by the stipulation.

The *Hamling* case also answers appellant's final reason for being relieved of the stipulation. He argues that *Miller* substitutes a test of lack of serious artistic or social merit for the Roth-Memoirs test of utterly without redeeming social value. He claims that this change is so substantial that he would not have stipulated to obscenity. The defendants in *Hamling* maintained that the test under the statute there applied was invalid because vague. However, the Court said:

> [O]ur opinion in *Miller* plainly indicates that we rejected the *Memoirs* "social value" formulation . . . because it represented a departure from the definition of obscenity in *Roth*, and because in calling on the prosecution to "prove a negative," it imposed a "[prosecutorial] burden virtually impossible to discharge" and which was not constitutionally required . . . Since *Miller* permits the imposition of a lesser burden on the prosecution in this phase of the proof of obscenity than did *Memoirs* and since the jury convicted these petitioners on the basis of an instruction concededly based on the *Memoirs* test, peti-

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2. (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

413 U.S. at 25.

> tioners derive no benefit from the revision of that test in *Miller*.
>
> 94 S.Ct. at 2907.

And so appellant by stipulating that the materials were without redeeming social value also stipulated that they were without serious artistic or social merit. We are unable to perceive unfairness or injustice in holding him to his stipulation.

In view of the fact that the appellant has failed to show prejudice as required by the Supreme Court's decision in *Hamling*, we must conclude that he was not entitled to a new trial and that the trial court's findings amount to a determination that the material here is obscene under either or both the *Miller* and *Roth-Memoirs* standards.

The judgment is affirmed.*

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* Many cases, both state and federal, have been remanded for further consideration in light of *Miller* and the other obscenity cases decided that day. Several courts have decided the question of obscenity under the new *Miller* tests without remanding for a new trial. *See e. g.* United States v. Groner, 494 F.2d 499 (5th Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3001 (U.S. June 24, 1974) (No. 73-1932); United States v. Cote, 485 F.2d 574 (5th Cir. 1973), *cert. denied*, ____U.S.____, 94 S.Ct. 3217 (1974); United States v. Miller, 482 F.2d 1379 (9th Cir. 1973). *See also* United States v. One Reel of 35 MM Color Motion Picture Film, 491 F.2d 956 (2d Cir. 1974); United States v. Thevis, 484 F.2d 1149 (5th Cir. 1973), *cert. denied*, ____U.S.____, 94 S.Ct. 3222 (1974); United States v. One Reel of Film, 481 F.2d 206 (1st Cir. 1973). In these latter cases the trial was held before *Miller* was announced, but the Courts of Appeal did not act until after *Miller*.